IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 501 & 502 of 2002
With
CROSS OBJECTION NOS.114 AND 115 OF 2006

HONOURABLE MR.JUSTICE ANIL R. DAVE

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NEW INDIA ASSURANCE CO.LTD. - Appellant(s)
Versus
JERAMBHAI GOVINDBHAI & 2 - Defendant(s)

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Appearance :
MR PV NANAVATI for Appellant(s) : 1,MR VIBHUTI NANAVATI for Appellant(s) : 1,
MR HARSHIT S TOLIA for respondents-original claimants
MR ANAND R PATEL for Defendant(s) : 2 - 3.

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 10/05/2007

CAV ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE KS JHAVERI)

1.0 The above First Appeal Nos.501 and 502 of 2002 are at the instance of New India Assurance Co. Ltd. Against the judgement and award dated 28th May 2001 passed by the Motor Accident Claims Tribunal (Main), Bhavnagar, in Motor Accident Claim Petition No.405 and 406 of 1998. The Cross-Objection Nos.114 and 115 of of 2006 are at the instance of original claimants. Cross Objection No.114 was filed by father and mother of deceased Rameshbhai Jerambhai and Cross Objection No.115 of 2006 was filed by the legal heirs of deceased Gauriben Rameshbhai It is required to be noted that during the pendency of the proceedings Jerambhai Govindbhai had also expired.

2.0 The short facts leading to the filing of the aforesaid Claim are as under:

2.1 On 24th May 1998 at about 8.30 am Rameshchandra Jerambhai and his wife Gauriben were travelling on Suzuki Motorcycle bearing No.GJ 5 B 5894. They were coming twoards Bhavnagar for taking medicines. Rameshbhai was driving his motorcycle slowly and on correct side of the road and when they reached near Vartej road on Bhavnagar highway, the original opponent no.1, who was the driver of the offending vehicle, came from Vartej side in a rash and negligent manner and tried to overtake his truck from the left side of the motorcycle. In that process the front bumper of the truck hit the rear side of the motorcycle and Rameshchdra and his wife Gauri fell down on the

road and were run over by the said truck. Thereafter the aforesaid claim petitions came to be filed.

2.2 The present appellant-Insurance Company has filed written statement at Exh.13 and has disputed the factum of income and negligence of the driver of the truck in question. The Tribunal has framed issues at Exh.24 and vide order dated 26th June 2000 consolidated both the claim petitions and common evidence was adduced.

2.3 After hearing the parties the Tribunal partly allowed the claim petitions and awarded a sum of Rs.2,66,400/- in MACP No.405/1998 and Rs.2,02,000/- in MACP No.406/1998 along with interest at the rate of 12% per annum. It is against the said judgement and awards the Insurance Company has filed the aforesaid Appeals.

4.0 At the outset, learned Advocate appearing for the respondents-original claimants (hereinafter referred to as the claimants) raised a preliminary objection that the appeals preferred by the Insurance Company are not tenable inasmuch as no application was filed under section 170 of the Act and since there was no permission to contest the claim petition on merits, the question of contesting the appeal on merits does not arise. In this connection he has relied upon a decision of this Court in the case of New India Assurance Co. Ltd. Vs. Alpesh Bhogilal Dave & Anr, reported in 2006(2) GLR 1362.

5.0 Mr. Nanavati, learned Advocate for the appellant submitted that the computation of income as arrived at by the Tribunal is against the settled principles of law. He submitted that the conclusion of the

Tribunal that the driver of the truck was negligent to an extent of 80% and the deceased motorcyclist was negligent to an extent of 20% is erroneous. According to him the Tribunal has considered the monthly prospective income of the deceased at Rs.2500/- without any supporting documentary evidence. He further submitted that the multiplier of 16 is on higher side. Learned Advocate further submitted that even taking the datum figure and the calculation is erroneous and therefore the appeal require to be allowed.

5.1 Mr. Nanavati, learned Advocate for the Insurance Company has relied upon the following decisions:

5.2 In the case of Donat Louis Machado V. L. Ravindra, reported in 1999 SCJ 1400 wherein the Court took a view that the deceased would have spent 2/3rd amount of his earnings on himself and his own family which he would have raised. He has also relied upon a decision in the case of Somabhai Vajabhai V.Babubhai, reported in 1982(1) GLR 785 in respect of very same principle.

5.3 In the case of The New India Assurance Company Limited Vs. Smt. Kalpana and others, reported in 2007(1) Supreme 514 wherein criteria for taking multiplier was laid down.

5.4 In the case of New India Assurance Co. Ltd. V. Charlie, reported in 2005(3) 2343, wherein it is upheld that deduction of 1/3rd of income made for personal expenditure while determining compensation under the head of loss of earning.

5.5 In the case of New India assurance Vs. Satender, reported in

2006(11) SCALE 589 wherein it is held that in case deceased is a non-earning person where the parents are claimants, the relevant factor would be age of parents.

5.6 In the case of Maharashtra State Road Transport Corporation Vs. Lalnipuii, reported in 2007 ACJ 561 wherein it is held that while parents are the claimants, the age of the deceased is not relevant and it is the age of the claimants which would determine the multiplier to be adopted.

5.7 In the case of Manjuri Bera Vs. The Oriental Insurance Co. Ltd. And Anr, reported in 2007(5) SCALE, wherein it is held that even if there is no loss of dependency the claimant if he or she is a legal representative will be entitled to compensation, the quantum of which shall be not less than the liability flowing from section 140 of the Act.

6.0 Mr. Tolia, learned Advocate for the claimants has submitted that the finding of the Tribunal that the motorcyclist was negligent to the tune of 20% is contrary to the evidence inasmuch as the Insurance Company has not examined any witness nor the driver of the truck has been called as witness. In that view of the matter the finding of the Tribunal regarding the contributory negligence is required to be reversed and the Insurance Company is required to be held completely liable.

6.1 He further submitted that the parents are entitled to compensation since the deceased son was the eldest and his income was proved to be Rs.4500/- per month. He submitted that the Tribunal has erroneously taken the income at Rs.2500/- per month which requires to be enhanced. He submitted that even if the prospective income is taken at Rs.6000/- the two-third thereof will come to Rs.4000/- and Rs.48000/-

per annum. Taking a multiplier of 13, the total amount would come to Rs.6,24,000/- He further submitted that the Tribunal ought to have awarded a sum of Rs.50000/- towards loss to the Estate and taking Rs.5000/- towards funeral expenses the total amount would come to Rs.6,79,000/-.

6.2 He further submitted that in respect of deceased daughter in law the claimant had claimed minimum income of Rs.3000/- and therefore the prospective income should have been Rs.4500/- per month. Even if two-third is taken, it comes to Rs.3000/- per month and per year it would come to Rs.36000/-. He submitted that applying multiplier of 13, the amount of compensation would come to Rs.4,68,000/-. He has also claimed Rs.50000/- towards loss to estate and Rs.5000/- by way of funeral expenses and in all the claim is Rs.5,23,000/-.

7.0 Learned Advocate for the claimants has relied upon a decision of this Court in the case of New India Assurance Co. V. A.B. Dave, reported in 2006(2) GLR 1362 wherein it is held that the Insurance Company is not entitled to contest proceedings on merit in absence of reasoned order in writing from MAC Tribunal.

7.2 He has next relied upon a decision in the case of Fakeerappa and Anr. Vs. Karnataka Cement Pipe Factory and others, reported in 2004(1) Supreme 1059 wherein it is held that it would be appropriate to restrict the deduction for personal expenses to one-third of monthly income.

7.3 He has also relied upon a decision in the case of Lata Wadhwa & Ors. Vs. State of Bihar and others, reported in 2001(6) Supreme 151

wherein a sum of Rs.50000/- was awarded towards conventional figure.

8.0 We have heard the learned Advoates for the respective parties at length and perused the relevant documents on record.

8.1 As regards the preliminary contention that the appeals are not maintainable in absence of reasoned order in writing from MAC Tribunal, it is profitable to refer to the decision in the case of New India Assurance Co. Ltd (supra). In paragraph 7 of the said decision it is held as under:

> "7. It is a settled position of law, as observed in1998(3) SCC 140 (Shankarayya & Anr. V. United India Insurance Co. Ltd. & Anr.) that the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in Sec. 170 of the M.V. Act are found to be satisfied. The Insurance Company cannot be permitted to contest the proceedings on merits in the absence of a reasoned order in writing from the M.A.C.Tribunalas per the provisions of Sec.170 of the M.V. Act.The relevant Paragraph of this judgement is reproduced hereinafter:
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> "4. It clearly shows that the Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in the Sec. Are found to be satisfied and for that purpose the Insurance Company has to obtain

> order in writing from the tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. It is true that the claimants themselves had joined respondent No.1 Insurance Company in the claim petition, but that was done with a view to thrust the statutory liability on the Insurance Company on account of the contract of the insurance. That was not an order of the Court itself permitting the Insurance Company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two conditions mentioned in Sec. 170. Consequently, it must be held that on the facts of the present case, respondent No.1, Insurance Company was not entitled to file an appeal on merits of the claim which was awarded by the Tribunal."

Admittedly in the present case the Insurance Company did not have any reasoned order in writing from the MAC Tribunal as per the provisions of Section 170 of the Motor Vehicles Act. We are therefore of the opinion that the appeals filed by the Insurance Company are not competent and liable to be dismissed.

9.0 As regards the Cross Objections filed by the claimants are concerned,we have considered the same in detail. In the present case the claimants are the parents of Rameshchandra who has expired at the very young age. It is also required to be noted at during the pendency of the appeal the father of the said deceased Rameshchandra has also expired.

10.0 Jerambhai was examined and in his evidence he had stated that the accident had happened on 24th May 1998 while his son along with his daughter-in-law was going from Anandpar to Bhavnagar. He was informed about the incident at 11 O' clock that there was an accident in which his son and daughter in law had died in Sir T Hospital. At the time of accident his son was 25 years of age and he was earning Rs.5000/- per month. According to him he was a diamond cutter. He has also stated that he was looking after agricultural work and out of that he was getting Rs.45000/-. He stated that he has paralysis right from childhood an he was not able to look after the agricultural work. He has two sons and two daughters and the deceased was the eldest. In the cross examination he has stated that the agricultural work was thereafter being done on sharing basis and one third is given to the labourer. He stated that the daughter in law was about 24 years and was looking after the household activities and she was pregnant for about five months. In cross examination he has admitted that two crops were taken through daily wagers.

10.1 The claimant has also examined owner of the diamond factory where the deceased was working. He has stated that the deceased was earning between Rs.4200 and 5000 per month. In his cross examination he has admitted that he is keeping books of accounts, but he has no daily record to show that the deceased was working daily with him. He stated that he was making payment in cash to the workers and he stated that he was paying Rs.1,50,000/- to all the workmen who were 24 in number. He was running total six machines and in each machine there were four workers and therefore he has no voucher to establish that he was paying a total sum of Rs.1,50,000/-.

11.0 The learned Advocates have taken us through the Panchnama Exhibit 47. From the Panchnama it is established that the damage to the motor cycle was on the left hand side. It was established that the motorcyclist was on the right hand side of the truck and the truck has tried to overtake on the left side of the motorcycle and that is how the accident has occurred.

11.1 Looking to the overall circumstances of the case we are of the opinion that it cannot be said that the truck was solely responsible for the accident in question. It is expected from a motorcyclist to be on the left hand side of the road and from the record it is established that the motorcyclist was in the middle of the Highway and the Truck tried to overtake the motorcycle from left side as a result of which the accident has taken place. Therefore the contributory negligence as held by the Tribunal is just and proper and no error is committed by the Tribunal. Thus the contributory negligence as held by the Tribunal at 80% and 20% qua the driver of offending vehicle and the motorcyclist respectively is just and proper.

12.0 As regards the quantum of income the Tribunal has come to the conclusion that the deceased was earning Rs.2500/- per month and the dependency benefit was taken at Rs.30000/- per annum. Looking to the age of the deceased multiplier of 16 was taken and the datum figure was arrived at Rs.3,20,000/-. Rs.5000/- was awarded for loss of estate and a sum of Rs.5000/- for loss of love and affection. A sum of Rs.3000/- was awarded for the damage caused to the motorcycle.

12.1 From the evidence of the owner of the factory where the

deceased was working, it is seen that the deceased was earning between Rs.4200 and 5000 per month. However, there is no proof with regard to any agricultural income to the deceased and therefore no such figure can be taken. Therefore we are of the view that the prospective income can be taken at Rs.4800/- per month. From this as per the decision in the case of Donat Louis Machado (supra) 2/3rd is required to be deducted. Therefore the income would be Rs.1600/- per month and Rs.19200/- per annum. Further, looking the age of the parents and more particularly the fact that the father of the deceased has already expired, it would be appropriate to take a multiplier of 13. Therefore the datum figure would come to Rs.2,49,600/- Considering the overall facts and circumstances of the case, we are further of the opinion that a sum of Rs.25000/- would be just and proper towards loss to estate and a sum of Rs.5000/- toward funeral expenses. Therefore the total amount would come to Rs.2,79,600/- ie. Round figure of 2,80,000/-. 80% of the said amount would come to about Rs.2,24,000/-. However, the Tribunal has awarded a sum of Rs.2,66,400/-. Since the appeal of the Insurance Company has been dismissed, we are not inclined to interfere with the award in question. Therefore, the cross-objection fails and no further amount is required to be awarded.

13.0 In the case of deceased Gauriben we are inclined to take the prospective income at Rs.3000/- per month and after deduction of 2/3rd the amount would come to Rs.1000/- and annual income at Rs.12000/-. Taking multiplier of 13 the figure would come to Rs.1,56,200/- and adding Rs.25000/- and Rs.5000/- towards loss to estate and funeral expenses the amount would come to Rs.1,86,200/-. However, the Tribunal has awarded a sum of Rs.2,02,000/-. Therefore the cross-objection in respect of this award cannot be entertained.

14. In the result, the appeals and cross objections are dismissed. No order as to costs.

[ANIL R. DAVE J.]

[K.S. JHAVERI, J.]

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